the Supreme Court of the United States

OCTOBER TERM, 1951.

No. 184.

THE STANDARD OIL COMPANY,
an Ohio Corporation,
Appellant,

vs.

JOHN W. PECK,
Tax Commissioner of Ohio, and
JOHN J. CARNEY,
Auditor of Cuyahoga County, Ohio,
Appellees.

APPEAL FROM
THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF FOR THE APPELLANT.

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OPINIONS BELOW.

The opinion of the Board of Tax Appeals of Ohio is not reported, but appears at page 13 of the printed record. The opinion of the Supreme Court of Ohio is reported at 155 O. S. 61, 98 N. E. 2d 8.

JURISDICTION.

The final judgment of the Supreme Court of Ohio in this case was rendered March 14, 1951, on which day the Supreme Court of Ohio delivered its opinion and entered its decision on its journal (R. 11). An Application for Appeal was presented to, and allowed by the Chief Justice of the Supreme Court of Ohio on June 7, 1951 (R. 2).

Probable jurisdiction of this Court was noted October 8, 1951. Such jurisdiction rests on 28 U. S. C. 1257(2), as there was drawn in question in this case by Appellant the validity of Sections 5328 and 5325 of the General Code of Ohio on the ground of their being repugnant to the Constitution of the United States, and the decision of the Supreme Court of Ohio was in favor of their validity.

QUESTION PRESENTED.

The Supreme Court of Ohio held that Section 5328 and 5325 of the Ohio General Code require the taxation in Ohio, at their full value, of river boats and barges, owned by an Ohio corporation, which:

(1) Were habitually operated through waters of other states, the proportion of use in each other state being readily ascertainable,

(2) Had no part of their route mileage in Ohio,

(3) Had only a little over 1% of their route mileage through waters which even bordered on Ohio, and

(4) Entered Ohio, if at all, only sporadically.

The Supreme Court of Ohio further held that these statutes, so construed, were not unconstitutional as a deprivation of property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

The question presented by this Appeal is whether the holding of the Supreme Court of Ohio on this constitutional issue is erroneous.

STATUTES INVOLVED.

Sections 5328 and 5325 of the Ohio General Code read as follows:

"Sec. 5328. *Property to be entered on general tax list and duplicate.*—All real property in this state shall be subject to taxation, except only such as may be expressly exempted therefrom. All personal property located and used in business in this state and all domestic animals kept in this state, whether used in business or not shall be subject to taxation, regardless of the residence of the owners thereof. All ships, vessels and boats, and shares and interests therein, defined in this title as 'personal property,' belonging to persons residing in this state, and aircraft belonging to persons residing in this state and not used in business wholly in another state, shall be subject to taxation. All property mentioned in this section shall be entered on the general tax list and duplicate of taxable property as prescribed in this title."

"Sec. 5325. *'Personal property' defined.*—The term 'personal property' as so used, includes every tangible thing being the subject of ownership, whether animate or inanimate, other than patterns, jigs, dies, drawings, money and motor vehicles registered by the owner thereof, and not forming part of a parcel of real property, as hereinbefore defined; also every share or portion, right or interest, either legal or equitable, in and to every ship, vessel, or boat, of whatsoever name or description, used or designed to be used either exclusively or partially in navigating any of the waters within or bordering on this state, whether such ship, vessel, or boat is within the jurisdiction of this state or elsewhere, and whether it has been enrolled, registered, or licensed at a collector's office, or within a collection district in this state, or not."

STATEMENT.

Appellant is an Ohio corporation engaged primarily in producing, transporting, refining and marketing petroleum and its products. Its principal sources of crude oil are located in the southern and southwestern portions of the United States, and its refineries are located in Ohio and Kentucky. During 1944 and 1945, the years involved in this case, Appellant owned crude oil boats and barges which it employed in transporting oil from points on the lower Mississippi and Ohio Rivers to such points as Mt. Vernon, Indiana, and Bromley, Kentucky (R. 66 *et seq.*).

The portions of the Mississippi and Ohio Rivers traversed by the Appellant's crude oil boats and barges during 1944 and 1945 are indicated in red on Appellant's Exhibit 1 (R. 102A, offered R. 72). The same exhibit shows in green the route traversed by Appellant's gasoline boats and barges which are not involved in this case.

The great bulk of the operation of Appellant's boats and barges during this period was on three regular routings: Memphis, Tennessee, to Mr. Vernon, Indiana; Memphis, Tennessee, to Bromley, Kentucky; and Baton Rouge or Gibson's Landing, Louisiana, to Bromley, Kentucky (R. 66, 102B)—Mt. Vernon, Indiana, and Bromley, Kentucky, being the two river terminals of Appellant (R. 66, 75, 76). The miles and "barrel miles" (number of miles multiplied by number of barrels of crude oil carried) traversed by each boat on each route during the period in question are shown on Appellant's Exhibit 2 (R. 102B, offered R. 79).

Of the total river mileage traversed by Appellant's boats and barges here involved on any of their trips up the Mississippi and Ohio Rivers, the maximum through waters bordering on Ohio was only 17½ miles. These

17½ miles were the 17½ miles of the Ohio River east of the Indiana-Ohio border, which the boats and barges had to traverse to get to Bromley, Kentucky, which is across the Ohio River from Cincinnati (R. 73, 74). Even these 17½ miles were not within the State of Ohio, since the southern border of Ohio is low water mark on the Ohio side of the river. (*Handly's Lessee vs. Anthony*, 5 Wheat. 374 (1820).) At no time during 1944 or 1945 did any of the crude oil boats and barges owned by Appellant on January 1, 1945, or January 1, 1946,* proceed farther east than Bromley, Kentucky. While one trip was made to Catlettsburg, Kentucky, east of Bromley, in 1944, this trip was made by a boat which was sold during 1944 and is not here involved (R. 77).

Perhaps the best measure of the activity of Appellant's crude oil boats and barges in various waters on various portions of their route is the percentage of "barrel miles" attributable to such portions of the route. Using this measurement, Appellant's Exhibit 2 (R. 102B, offered R. 79) shows that the percentage of barrel miles operated by Appellant's various boats in the portion of the river bordering on Ohio in 1944 and 1945 ranged from less than 1% to less than 2%, the average of all boats for the two years being 1.26%. The same exhibit shows that, if a "mileage," rather than a "barrel mileage" basis was used, only .7 of 1% was in the portion of the river bordering on Ohio. Of course, as already explained, none of these barrel miles were actually within Ohio. As stated by Mr. Pattison, who prepared Appellant's Exhibit 2, the term "Ohio waters" used in such exhibit means merely the

* Ohio personal property tax assessments are made as of the first of each year on the basis of the facts existing in the prior year.

portion of the Ohio River bordering on Ohio, not waters actually within Ohio (R. 74).

While Appellant's crude oil boats and barges are registered from Cincinnati (R. 79), Mr. Pattison testified that this had no particular significance and that the boats could equally well have been registered from any point (R. 80). As a matter of fact, registry is a formality required by Federal law, which has some significance under the Federal Navigation and Ship Mortgage laws (See 46 U. S. C. 17, 18), but has no significance under any Ohio law.

All major repairs of the boats and barges were made at Paducah, Kentucky, St. Louis, Missouri, or some other down-river point, and they were drydocked at these points (R. 79, 80). The only time any of the boats or barges ever docked at an Ohio port during the years in question was when a boat, after discharging its cargo at Bromley, Kentucky, occasionally stopped at Cincinnati for a couple of hours for food, fuel or minor repairs, just as it frequently did at other points farther south on the river. No cargo was ever unloaded or taken on at Cincinnati during the years in question, as the boats and barges always went back down the river empty (R. 84).

Even when a boat docked at Cincinnati on one of its occasional stops, it was almost certainly still not within the State of Ohio because, as we have seen, the State of Kentucky extends all the way to low water mark on the Ohio side of the river, and, presumably, a boat would not be docked where it would be grounded.

The Tax Commissioner of Ohio included Appellant's boats and barges in its Ohio personal property tax assessment for 1945 at a value of $1,322,863.00, and in its assessment for 1946 at a value of $1,303,907.00. Appellant did

not question these valuations but contended in its Appeal to the Board of Tax Appeals of Ohio, first, that Sections 5328 and 5325 of the Ohio General Code did not require the taxation of Appellant's boats and barges, because they were not used in Ohio, and their use in waters bordering on Ohio was insubstantial, and, second, that if these statutes did so require, they were violative of the due process clause of the Fourteenth Amendment of the United States Constitution (R. 58).

After hearing the evidence in the case, the Board of Tax Appeals affirmed the Tax Commissioner's assessment by a two to one vote, the majority holding that the statutes did require the taxation of the boats and barges, and that the Board, not being a court, had no authority to pass on the constitutionality of the statutes (R. 13, 18). The third member of the Board dissented on the ground that Appellant's river boats and barges were not "within Ohio," and therefore could not constitutionally be taxed by Ohio (R. 39).

From the decision of the Board of Tax Appeals, Appellant appealed to the Supreme Court of Ohio. The Supreme Court of Ohio first affirmed the Board's decision that Sections 5328 and 5325 required the taxation of the boats and barges. It then proceeded to consider on the merits the question whether these statutes, so construed, were repugnant to the due process clause, and held that they were not. This holding is evidenced by the Supreme Court of Ohio's judgment (R. 11), its opinion (R. 103), and its certificate of intent (R. 123).

In reaching this conclusion, the court accepted the facts as above set forth, and conceded that, under the decision of this Court in *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169 (1949), Appellant's boats and barges

were probably taxable on an apportioned basis by all the states on the Ohio and Mississippi Rivers through whose waters they regularly navigated. In spite of this, the court concluded that, under the case of *Northwest Airlines, Inc. v. Minnesota*, 322 U. S. 292 (1944), which was mentioned but not modified in the *Ott* case, the statutes of Ohio, Appellant's domicile, taxing the entire value of Appellant's boats and barges, were valid. With reference to the contention of Appellant that, if the foreign states could tax the boats and barges on an apportioned basis and Ohio could at the same time tax their entire value, the boats and barges would bear a multiple tax burden, the Supreme Court of Ohio stated:

> "The Supreme Court of the United States [in the *Ott* case] applied the rule to the taxation of tangible property which it had theretofore applied to the taxation of intangible personal property, that is, that such property may be taxed both at its domiciliary situs and at the place where it had acquired a business situs."

This is an appeal from the above decision of the Supreme Court of Ohio.

SPECIFICATION OF ERRORS.

The assigned errors which Appellant intends to urge are that the Supreme Court of Ohio erred in the following respects:

1. In holding that Ohio, the domiciliary state of Appellant, on the facts disclosed by the record, had jurisdiction to tax Appellant's boats and barges, at their full value and without apportionment, for Ohio Personal Property Tax purposes for the years 1945 and 1946, although these boats and barges were used solely and habitually in navigating the Mississippi and Ohio Rivers from points in

Louisiana or Tennessee to points in Indiana or Kentucky, all their route-mileage was outside of Ohio, only 1.27% of such route-mileage was in waters which bordered on Ohio, and the boats and barges entered Ohio, if at all, only rarely and sporadically; and

2. In failing to hold that Sections 5328 and 5325 of the General Code of Ohio, which it construed to require the taxation of Appellant's boats and barges, at their full value and without apportionment, for Ohio Personal Property Tax purposes for 1945 and 1946, were violative of and repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States (R. 3).

SUMMARY OF ARGUMENT.

Under the due process clause, tangible property is not subject to multiple taxation. The state of domicile of the owner can tax tangible property which has not acquired a situs elsewhere as, for instance, ocean-going vessels, which would otherwise escape taxation entirely. However, tangible property which has acquired a situs elsewhere, i.e., in a foreign state, can be taxed only by such foreign state. This rule granting exclusive taxing power to the foreign state is based on the special benefits and protection given to the tangible property by the foreign state where it is actually located, and has been reaffirmed by this Court many times—even in those cases, such as *Curry v. McCanless,* 307 U. S. 357, which have held that the rule does not extend to intangibles.

This rule has been applied by this Court to vehicles of surface transportation which habitually operate in more than one state: Thus, on the one hand, this Court has consistently held that, where rolling stock is habitually used

within one or more foreign states, each such foreign state has jurisdiction to tax the same on an apportioned basis reflective of the average number of cars used within its borders, and has also held that the same rule of apportionment applicable to rolling stock is applicable to river boats (*Ott v. Mississippi Barge Line*, 336 U. S. 169). On the other hand, the Court has held that, to the extent rolling stock or river boats acquire a situs in one or more foreign states so as to be taxable on an apportioned basis by such states, the jurisdiction of the domiciliary state to tax them is correspondingly diminished. This was specifically held by this Court in *Union Transit Co. v. Kentucky*, 199 U. S. 194, and reaffirmed in *Johnson Oil Co. v. Oklahoma*, 290 U. S. 158, on the principle that tangible property is protected from multiple taxation. While both these cases relate to rolling stock, they are fully applicable to the instant case, in view of the holding in the *Ott* case (wherein the facts are almost identical with those in the instant case) that the rule of apportionment applies to river boats in the same manner as it does to rolling stock.

While there is language in *New York Central R. R. v. Miller*, 202 U. S. 584, and *Northwest Airlines v. Minnesota*, 322 U. S. 292, indicating that a foreign state does not acquire jurisdiction to tax cars or boats used habitually within its borders, and that the domiciliary state does not correspondingly lose jurisdiction to tax the full value thereof, unless one or more cars or boats were within the foreign state permanently and continuously throughout the tax year; such language was not necessary to the decision of either of these case. Such a limitation on the rule of apportionment would, moreover, not be reasonable, since a foreign state which has given benefits and protection during most of a tax year should not be totally deprived of jurisdiction to tax, nor should the domiciliary

state be given the right to tax full value, just because there were a few days during the tax year when there were no cars or boats in the foreign state. That no such limitation exists is, moreover, shown by *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, *Union Transit Co. v. Kentucky*, 199 U. S. 194, and *Johnson Oil Co. v. Oklahoma*, 290 U. S. 158, in all of which cases the rule of apportionment was applied even though it was not shown that any cars were in the foreign state on every day of the tax year.

These cases and the above reasoning also show the unsoundness of the view expressed in the *Miller* case to the effect that the rule of apportionment, even if otherwise applicable, is defeated if cars or boats are used within the domiciliary state for any portion of the tax year. However, even if this view were sound, it would be inapplicable to the instant case and the rule of apportionment would apply thereto, because Appellant's boats and barges entered Ohio only rarely and sporadically, if they entered it at all.

Accordingly, as Appellant's boats and barges were used exclusively in transporting crude oil from points on the lower Mississippi to points on the Ohio River; as their route-mileage on each routing is clearly shown and their route-mileage within each state is readily calculable; as no part of their route-mileage was within Ohio; as they never took on or delivered cargo in Ohio and were never dry-docked or given major repairs there; as the only time they docked at an Ohio port was on those sporadic occasions when they put in to Cincinnati, as they might to any other port, for food and minor repairs; and as even then, they were in Ohio only if they docked above low-water mark; these boats and barges were taxable on an apportioned basis by the various foreign states through which they operated, but, because of the due process clause, they were not taxable in Ohio.

ARGUMENT.

1. Under the due process clause tangible personal property is not subject to multiple taxation.

This Court has held consistently that under the due process clause of the Fourteenth Amendment, real estate and tangible personal property are not subject to multiple taxation.

Where tangible property has no definite situs, so that, if the state of domicile of the owner is not permitted to tax, the property will be free from taxation anywhere, this Court has held it consistent with due process for the domicile to tax the full value of the property, even though it never comes within the territorial limits of the state. *Southern Pacific Co. v. Kentucky*, 222 U. S. 63 (1911).

But where tangible property has a definite situs in a foreign state, this Court has always held that such foreign state has jurisdiction to tax, and that taxation by the state of domicile of the owner is a denial of due process. *Jeffersonville Ferry Co. v. Kentucky*, 188 U. S. 385, 396 (1903); *Union Transit Co. v. Kentucky*, 199 U. S. 194 (1905).

The basis of such holding has been that, while other states, such as the state of the domicile of the owner, might have some conceivable relation to the enjoyment of land or chattels located in another state, the benefits and protection conferred by the state where such property is actually situated are so much greater than are conferred by any other state that it is contrary to fundamental justice to allow any other state to tax it. In holding that this rule, already long established as to real estate, applied equally to tangible personal property, this Court stated in *Union Transit Co. v. Kentucky*, 199 U. S. 194, 204:

> "The argument against the taxability of land within the jurisdiction of another state applies with equal

cogency to tangible personal property beyond the jurisdiction. It is not only beyond the sovereignty of the taxing state, but does not and cannot receive protection under its laws. True, a resident owner may receive an income from such property, but the same may be said of real estate within a foreign jurisdiction."

At one time, and for a short period, this Court held that intangible property, as well as tangible property, was free under the due process clause from multiple taxation. *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204 (1930); *Baldwin v. Missouri*, 281 U. S. 586 (1930); *First National Bank v. Maine*, 284 U. S. 312 (1932).

This Court later overruled these decisions, and returned to its earlier viewpoint that, since intangibles were "but relationships between persons * * * which the law recognizes by attaching to them certain sanctions enforceable in courts," such property could be subjected to multiple taxation without violating the due process clause. *Curry v. McCanless*, 307 U. S. 357, 366 (1939). However, in reaching this conclusion with respect to intangibles, the Court reaffirmed the rule that tangible property is not subject to multiple taxation, stating at page 363:

> "That rights in tangibles—land and chattels—are to be regarded in many respects as localized at the place where the tangible itself is located for purposes of the jurisdiction of a court to make disposition of putative rights in them, for purposes of conflict of laws, and for purposes of taxation, is a doctrine generally accepted both in the common law and other legal systems before the adoption of the Fourteenth Amendment and since."

The differences between intangibles and tangibles, so far as the protection and benefits derived from governments are concerned, may in one sense be differences of

degree. However, the protection and benefits which a piece of real estate or a chattel derives from the State in which it is actually located are so much greater than intangible property, or its owner, derives from any particular state that, like many other differences in degree, it amounts to a difference in kind. As we have seen, this Court has consistently supported this view, and has consistently held tangible property constitutionally free from multiple taxation.

We shall now consider the manner in which this principle has been applied to vehicles of surface transportation which are used in more than one state.

2. Vehicles of surface transportation, such as river boats and rolling stock, are taxable on an apportioned basis by each foreign state in which they are habitually used.

The earliest cases involving jurisdiction to tax vehicles of surface transportation related to ocean-going vessels, which spent most of their time on the high seas and had no definite situs in any state. Realizing that if such vessels could not be taxed by the state of domicile of the owner, they would probably escape taxation everywhere, this Court held that the state of domicile of the owner had jurisdiction to tax them, and that its jurisdiction was exclusive. *Hays v. Pacific Mail S. S. Co.*, 17 How. 596 (1854); *Morgan v. Parham,* 16 Wall. 471 (1872); *Southern Pacific Co. v. Kentucky,* 222 U. S. 63 (1911).

Where, however, an ocean-going tug was used solely on the waters of a single foreign state, this Court had no hesitation in holding that such foreign state had jurisdiction to tax, and indicated that this jurisdiction was exclusive. *Old Dominion S. S. Co. v. Virginia*, 198 U. S. 299 (1905).

In *Ayer & Lord Co. v. Kentucky*, 202 U. S. 409 (1906), the Court denied the right of Kentucky to tax boats owned by an Illinois corporation and used in navigating the Mississippi River and its tributaries within the boundaries of various states. However, Kentucky made no attempt in this case to show that the boats were used habitually in Kentucky waters for any ascertainable portion of the time, but rested its claim solely on the fact that the boats were enrolled at Paducah, Kentucky—a fact which this Court held to be without significance, as an owner under Federal law had an arbitrary discretion as to where to register his boat, and registration in a particular state did not indicate that such state was conferring any benefits or protection on the boat.

During the period covered by these decisions on the taxation of watercraft, this Court was also called on to decide cases involving the taxability of rolling stock. In these cases this Court held that, where a fleet of railroad cars was used habitually in foreign states, all such foreign states had jurisdiction to tax a fairly apportioned part of the value of the entire fleet of cars, leaving the state of domicile of the owner free to tax only such part as had not acquired a situs in any other state.

One of the first cases on this point was *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18 (1891). In that case the Pullman Company, an Illinois corporation, had at all times during the tax years in question about 100 coaches and cars in Pennsylvania, although these cars were not always the same cars. This Court held that Pennsylvania had the constitutional right to tax such proportion of the total value of the Pullman Company's capital stock as the number of miles of track over which it ran cars in Pennsylvania bore to the total number of miles of track in all states.

The case of *American Refrigerator Transit Co. v. Hall,* 174 U. S. 70 (1899), was similar, except that it was not shown either that the identical cars were used in the foreign state (Colorado) throughout the tax year, or even that there were some cars within such foreign state at all times during the tax year. The stipulation of fact on which the case was tried showed that the taxpayer's cars "never were run in said State in fixed numbers nor at regular times, nor as a regular part of particular trains," and that they were "only transiently present in said State"; but "that the average number of cars * * * within the State of Colorado during the year for which such assessment was made would equal 40." On these facts this Court held that Colorado, although not the domicile of the owner, had jurisdiction to make a tax assessment against the company based on the value ascribed to 40 cars. Mr. Justice Shiras stated at page 82:

> "We think that such a tax may be properly assessed and collected, in cases like the present where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing according to the exigencies of the business, and that the tax may be fixed by an appraisement and valuation of the average amount of the property thus habitually used and employed."

The question, whether the rule permitting rolling stock to be taxed on an apportioned basis by each foreign state in which it is habitually used also applies to river boats, was first presented to this Court in the recent case of *Ott v. Mississippi Barge Line,* 336 U. S. 169 (1949). The facts in that case were almost identical with those in the instant case. The boats and barges there involved were owned by several Delaware corporations, all of whose cases were tried together. These boats were used in trans-

porting freight up and down the Mississippi and Ohio Rivers. They were not registered at any Louisiana port and were not operated on a fixed schedule in Louisiana or anywhere else, but from 2 to 17% of the total number of miles which the boats of the various companies traveled were within Louisiana waters. The boats docked at Louisiana ports for such comparatively short periods of time as were required to discharge and take on cargo and make temporary repairs. On these facts Louisiana assessed taxes against the companies "based on the ratio between the total number of miles of appellees' lines in Louisiana and the total number of miles of the entire line." The companies contended that, under the rule previously established as to ocean-going vessels, no part of the value of their boats and barges was taxable by Louisiana, but that the entire value thereof was within the exclusive taxing jurisdiction of the state of domicile of the owner. This contention was sustained by the District Court and by the Circuit Court of Appeals, both of which ruled against Louisiana's right to tax.

This Court, however, reversed the decision of the lower courts and ruled in favor of Louisiana. In so ruling, it held that river boats, which, unlike ocean-going boats but like rolling stock, were at all times within the limit of some state, should be taxed under the rule of apportionment, in exactly the same manner as rolling stock. Mr. Justice Douglas stated as follows at page 174:

> "We see no practical difference so far as either the Due Process Clause or the Commerce Clause is concerned whether it is vessels or railroad cars that are moving in interstate commerce. The problem under the Commerce Clause is to determine 'What portion of an interstate organism may appropriately be attributed to each of the various states in which it functions.'

Nashville, C. & St. L. R. Co. v. Browning, 310 U. S. 362, 365, 60 S. Ct. 968, 970, 84 L. Ed. 1254. So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State. See *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 444, 61 S. Ct. 246, 249, 85 L. Ed. 267, 130 A. L. R. 1229. Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the State.

"* * * We can see no reason which should put water transportation on a different constitutional footing than other interstate enterprises."

It is thus the established rule of this Court that river boats as well as rolling stock are taxable on an apportioned basis by each foreign state in which they are habitually used.

3. To the extent that such vehicles of surface transportation are taxable on an apportioned basis by foreign states, they are outside the taxing jurisdiction of the state of domicile of their owner.

Under the doctrine consistently followed by this Court that tangible property is not subject to multiple taxation, it follows, that, to the extent that a foreign state has jurisdiction to tax tangibles on an apportioned basis, these are not subject to taxation by the domiciliary state.

This was the express holding of this Court in *Union Transit Co. v. Kentucky*, 199 U. S. 194 (1905). In that case the company was incorporated in Kentucky and owned a fleet of cars which it rented to shippers who used them all over the United States. While there was no showing that any of the cars were outside Kentucky during the entire year, it was shown that the average number of

cars used in Kentucky during the years in question ranged from 28 to 67, out of a total of 2,000 cars. In spite of the fact that only 1 to 3% of the use of the cars was within its borders, Kentucky, on the ground that it was the domicile of the owner, attempted to tax the entire value of the fleet. The company contended that such taxation would result in a deprivation of its property without due process of law, in violation of the Fourteenth Amendment. This Court, after a careful review of the authorities relating to the taxation of tangibles, sustained the company's contention, stating at page 211:

> "We are of opinion that the cars in question, so far as they were located and employed in other states than Kentucky, were not subject to the taxing power of that commonwealth."

In the case of *N. Y. Central Railroad v. Miller*, 202 U. S. 584 (1906), the Supreme Court recognized the rule of the *Union Transit* case, but held that it did not apply where all the company's cars were used inside the domiciliary state for some proportion of the year, and their use outside the state was so irregular that they acquired no situs for tax purposes in any other state. In distinguishing the *Union Transit* and similar cases, the Court stated at page 597:

> "In the present case, however, it does not appear that any specific cars or any average of cars was so continuously in any other State as to be taxable there. The absences relied on were not in the course of travel upon fixed routes but random excursions of casually chosen cars, determined by the varying orders of particular shippers and the arbitrary convenience of other roads."

In other words, the *Miller* case presented another situation in which denial to the state of domicile of the

right to tax the full value of the fleet of cars would have resulted in a part of the fleet escaping taxation entirely, as no other state would have had jurisdiction to tax any part not taxed by the domicile.

The rule of the *Union Transit* case was reiterated by this Court, subsequent to the decision of the *Miller* case, in *Johnson Oil Co. v. Oklahoma,* 290 U. S. 158 (1933). In that case the Company, an Illinois corporation, owned a fleet of tank cars, which were infrequently used at an oil plant which it owned in Illinois. The principal use of the cars was in transporting petroleum products from the company's refinery in Oklahoma to points in other states, and returning to the refinery in Oklahoma to be reloaded. Each car was outside the State of Oklahoma from 20 to 29 days out of each month. Most of the repair work on the cars was done at the Oklahoma refinery. Although the daily average number of cars in Oklahoma during the tax years in question was only between 37 and 66 cars out of a total of about 380 cars. Oklahoma attempted to tax the entire value of the fleet, on the theory that all the cars had acquired a taxable situs there. The company resisted this assessment on the ground that it would deprive it of property without due process of law in violation of the Fourteenth Amendment.

This Court unanimously sustained the company's contention and held that Oklahoma could tax only the daily average number of cars within Oklahoma. Mr. Chief Justice Hughes stated at page 161:

> "Appellant had its domicile in Illinois, and that State had jurisdiction to tax appellant's personal property which had not acquired an actual situs elsewhere. 'The State of origin remains the permanent situs of the property notwithstanding its occasional excursions to foreign parts.' See *New York Central & H. R. R. Co. v.*

Miller, 202 U. S. 584, 597; *Southern Pacific Co. v. Kentucky*, 222 U. S. 63, 69. *But the State of the domicile has no jurisdiction to tax personal property where its actual situs is in another State. Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 209, 211; *Western Union v. Kansas*, 216 U. S. 1, 38; *Frick v. Pennsylvania*, 268 U. S. 473, 489. While in this instance, it cannot be doubted that the cars in question had acquired an actual situs outside the State of Illinois, the mere fact that appellant had its refinery in Oklahoma would not necessarily fix the situs of the entire fleet of cars in that State. The jurisdiction of Oklahoma to tax the property of this description must be determined on a basis which is consistent with the like jurisdiction of other States."*

While the holding of the *Johnson* case was that Oklahoma, as a foreign state, could tax only a properly apportioned part of the fleet, the above language clearly reiterates the rule of the *Union Transit* case that, to the extent that part of the fleet acquires an actual situs for taxation elsewhere, the taxing jurisdiction of the domiciliary state is correspondingly diminished.

As already pointed out, this Court held in the *Ott* case that river boats are governed by the same rule as rolling stock, and that, where such boats are used habitually, rather than sporadically, in the waters of foreign states, such foreign states have jurisdiction to tax such boats on an apportioned basis reflective of the percentage of use within such states. In view of this, we submit that, under the *Union Transit* and *Johnson Oil* decisions, the domiciliary state retains jurisdiction to tax only such portion of the value of a fleet of river boats as has not so acquired a taxable situs in foreign states.

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* Emphasis is ours throughout this brief unless otherwise indicated.

4. The above rules apply even in the absence of proof that any individual boat, or any number of changing boats, was within a particular foreign state on each of 365 days of the year, so long as it is shown, as it is here, that the boats were used habitually in the particular foreign state, in the usual course of their operations, and for an ascertainable proportion of their use.

There is language in some of the decided cases indicating that a foreign state does not acquire taxing jurisdiction over rolling stock or river boats, and that the domiciliary state does not correspondingly lose jurisdiction to tax the full value thereof, unless either individual cars or boats, or at least some number of changing cars or boats, were within the foreign state permanently and continuously throughout the year—that is, on all 365 days of the year. The two cases particularly using such language are *N. Y. Central R. R. v. Miller,* 202 U. S. 584 (1906) and *Northwest Airlines v. Minnesota,* 322 U. S. 292 (1944).

However, in neither of these cases was this language necessary to the decision. In the *Miller* case, in which the jurisdiction of the domiciliary state to tax the full value of rolling stock was sustained, the largest part of the use thereof was in the domiciliary state, and it was not shown that the railroad cars there involved were used in any particular foreign state habitually or for an ascertainable proportion of their use. Thus, the Court stated at page 597 of its opinion:

> "The absences [from the state of domicile] relied on were not in the course of travel upon fixed routes but random excursions of casually chosen cars, determined by the varying orders of particular shippers and the arbitrary convenience of other roads."

The *Northwest* case involved, not rolling stock or river boats, but aircraft, and there is an indication in some of the opinions given by the members of this Court that the taxation of aircraft is governed by the rule of exclusive domiciliary jurisdiction applicable to ocean-going vessels, rather than by the rule of apportionment which applies to rolling stock and river boats. Furthermore, considerable weight was given in the *Northwest* case to the fact that a substantial portion of the route ordinarily traversed by the planes, as well as their principal repair and maintenance bases, were located in the domiciliary state—which was not the fact either in the *American Refrigerator Transit* case, the *Union Transit* case, the *Ott* case, or in the instant case.

Apart from the fact that the *Miller* and *Northwest* cases are distinguishable from these cases, we do not believe that either reason or authority sustains the contention that cars and river boats are taxable by a foreign state and correspondingly free from taxation by the domiciliary state only when some cars or boats are within the particular foreign state on each of the 365 days of the tax year.

Certainly the foreign state does not acquire, or the domiciliary state correspondingly lose, taxing jurisdiction, unless the cars or boats are used in the foreign state habitually, in the usual course of their operations, for an ascertainable proportion of their use. However, if these conditions are fulfilled and one or more of the boats or cars is in the foreign state on each of, say, 360 days in the year, we submit that it would not be reasonable to defeat entirely the taxing jurisdiction of the foreign state, or to give the domiciliary state the right to tax the full value of the fleet, just because the trips were so arranged that on five

scattered days throughout the year none of the cars or boats happened to be within the foreign state.

Such a result would be contrary to the whole basis of the doctrine of apportionment. This Court has always indicated that jurisdiction to assess a property tax on cars or river boats depends on whether "the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing state" (*Ott v. Mississippi Barge Line*, 336 U. S. 169, 174). Certainly depriving a foreign state of all right to tax boats which have enjoyed its benefits and protection for 360 out of 365 days is not giving it taxing jurisdiction commensurate with the benefits or protection which it has afforded. Of course, if the number of days the boats are present in the foreign state is less than 365, this fact should be reflected in determining the average portion of the fleet taxable by the foreign state.

That the taxing jurisdiction of a foreign state in which cars or boats are habitually used, and the corresponding diminution in the jurisdiction of the domiciliary state, do not depend on at least one car or boat being within the foreign state on each of 365 days of the tax year is clearly evidenced by three of the cases which we have already discussed.

Thus, in *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70 (1899) the jurisdiction of Colorado, a foreign state, to tax rolling stock on an apportioned basis, was sustained *even though it was not shown either that the identical cars were used in Colorado throughout the year, or that there was at least one car in Colorado on each day of the year.* The only showing was that the average number of cars used in Colorado during the year was 40. In sustaining the right of Colorado to tax these 40 cars, this Court stated "that the tax may be fixed by an appraisement

and valuation of the *average amount* of the property thus *habitually* used and employed."

In the case of *Union Transit Co. v. Kentucky*, 199 U. S. 194 (1905), the domiciliary state had attempted to tax the entire value of a fleet of refrigerator cars, even though only one to three percent of the use of the cars was within the domiciliary state. *There was no evidence in the case either that one or more cars were in any particular foreign state on every day of the year, or even that any of the cars was out of the domiciliary state throughout the entire year.* The evidence was merely that the company rented out its cars to various railroad lines, that the cars were habitually used by the railroad lines in various states, and that the cars could be fairly apportioned among all the states, including the domiciliary state, by means of a formula. The formula used apportioned to Kentucky and to each foreign state such number of cars out of the entire fleet as the gross income of the company from car rentals attributable to each state bore to the company's entire gross income from car rentals everywhere. On the basis of this showing, this Court indicated that each foreign state could tax the number of cars allocable to it under the formula, and held that, under the due process clause, the domiciliary state could tax only the one to three percent of the cars which the formula allocated to it.

In *Johnson Oil Co. v. Oklahoma*, 290 U. S. 158 (1933) discussed on page 20 hereof, this Court held that Oklahoma, a foreign state, could tax an apportioned part, but could not tax the entire value, of a fleet of tank cars owned by an Illinois corporation and habitually used in transporting petroleum products from the corporation's refinery in Oklahoma to destinations in other states. *The evidence did not show, nor did the Court consider, whether one or more, or any average number, of the cars, was within Okla-*

homa on each day of the tax year. Mr. Chief Justice Hughes, speaking for a unanimous court, stated the rule as follows at page 162:

> "*The basis of the jurisdiction is the habitual employment of the property within the State.* By virtue of that employment the property should bear its fair share of the burdens of taxation to which other property within the State is subject. When a fleet of cars is habitually employed in several States—the individual cars constantly running in and out of each State—it cannot be said that any one of the States is entitled to tax the entire number of cars regardless of their use in the other States. When individual items of rolling stock are not continuously the same but are constantly changing, as the nature of their use requires, this Court has held that a State may fix the tax by reference to the *average number of cars found to be habitually within its limits.*"

It is significant that the *Johnson Oil* case was decided after the *Miller* case. The principle laid down by the *Johnson Oil* case is that the jurisdiction of a foreign state to tax rolling stock, and the corresponding diminution of the right of the domiciliary state to tax the same, do not depend on the continuous presence of one or more cars in the foreign state on each day of the tax year, but merely on there being an average number of cars, whether changing or not, habitually within the foreign state in the tax year; also, that the tax assessed by each foreign state must be apportioned so as to reflect the extent of the use of the rolling stock therein. No case involving the taxation of rolling stock decided by this Court since the *Johnson Oil* case has in any way overruled or even called into question the principles laid down therein.

The principles applicable to the taxation of rolling stock were declared in *Ott v. Mississippi Barge Line,* 336

U. S. 169 (1949) to apply also to river boats. The facts as stated by this Court in the *Ott* case give no indication that there were one or more boats in Louisiana on each day of the tax year. However, as the Attorney General of Louisiana conceded that the statute there involved—unlike the Ohio statutes in question here—applied only where there was an average number of boats in Louisiana "throughout the taxing year," this Court decided the case on such assumption. It therefore did not have to consider whether Louisiana's taxing jurisdiction would have been lost if there had been one or more days during the tax year when no boats were in Louisiana. We submit that, if this Court had considered such question, it would have answered it in the negative in view of the principles enunciated in the *American Refrigerator Transit*, *Union Transit*, and *Johnson Oil* cases.

These principles are equally applicable to the instant case. The boats and barges of Appellant were used habitually, indeed exclusively, in transporting crude oil from points of origin on the lower Mississippi to destinations on the Ohio River. The great bulk of this use was on three routings—Memphis, Tennessee to Mt. Vernon, Indiana; Memphis, Tennessee to Bromley, Kentucky; and Baton Rouge or Gibson's Landing, Louisiana, to Bromley, Kentucky (R. 66). Appellant's Exhibit 2 (R. 102B offered R. 79) shows the exact mileages and barrel mileages on each routing, and the precise mileage or barrel mileage in each foreign state is readily calculable. No part of the route mileage of the boats and barges was within the domiciliary state, nor were they ever drydocked or given major repairs there (R. 79, 80). It follows that, under the rule laid down by this Court in the cases above cited, Appellant's boats and barges were taxable on an apportioned basis by each of the foreign states in which they were used, and no part of them was taxable in Ohio.

5. The mere fact that some of Appellant's boats and barges sporadically docked at Cincinnati did not destroy the jurisdiction of the foreign states to tax them on an apportioned basis, or give the domiciliary state jurisdiction to tax them at full value.

The *Miller* case, in addition to containing language indicating that a foreign state has jurisdiction to tax cars or boats on an apportioned basis only if there are some cars or boats in the foreign state on every day of the year, also contains language indicating that the domiciliary state has sole jurisdiction to tax any car or boat which enters it at any time during the tax year, even though most of the habitual use of the car or boat was in foreign states.

The discussion under 4. above adequately shows the lack of basis for this view. If a fleet of cars or boats is habitually used in a foreign state for an ascertainable portion of its use, and enjoys the protection of the foreign state during such use, there is no reason why the foreign state should be deprived of the right to assess a commensurate tax, or the domiciliary state given exclusive jurisdiction to tax, just because at some time during the year the cars or boats enter the domiciliary state.

This is, moreover, fully shown by the cases cited in 4. above. Thus, in the *American Refrigerator* case Colorado, a foreign state, was allowed as a result of apportionment to tax 40 of a fleet of cars, although there was no showing that any of the company's fleet was absent from the domiciliary state during the entire tax year. On the other hand, in the *Union Transit* case, Kentucky, the domiciliary state, was not allowed to tax more than 1 to 3% of the cars, although there was no showing that the 97 or 99% which Kentucky was not allowed to tax because they were habitually used in other states, never entered Kentucky during the tax year. Finally, in the *Johnson Oil*

case, Oklahoma, in common with other foreign states, was allowed to tax cars on an apportioned basis, even though it was affirmatively shown that the company's cars were occasionally used at an oil plant owned by the company in the domiciliary state (290 U. S. 158, 160).

As a matter of fact, even if the rule of apportionment did not apply where any part of the use of the cars or boats during the tax year was within the domiciliary state, such rule would nevertheless apply in the instant case, because no part of the route mileage of Appellant's boats and barges was in Ohio and such entry of the boats and barges into Ohio as was made was sporadic.

Thus, as was shown on page 5 of this brief, all the route mileage and barrel mileage of Appellant's boats and barges was in waters of foreign states. While .7 of 1% of the mileage, or 1.26% of the barrel mileage, was through the portion of the Ohio River *bordering on* Ohio, even this was not *within* Ohio, since the Ohio River all the way up to low water mark on the Ohio side is part of Kentucky. The boats and barges never took on, or delivered, any cargo in Ohio. They were never drydocked or given major repairs in an Ohio port, but always at St. Louis, Paducah, or some other downriver point. The only time any of the boats and barges ever entered an Ohio port was on those sporadic occasions when a boat put in to Cincinnati, as it would to any other port, for food or minor repairs, and even then it was within Ohio only if it happened to be docked above low water mark, which was very unlikely because of the danger of grounding which such docking would involve.

These facts make it clear that, even if it were essential to the taxing jurisdiction of a foreign state in which cars or boats are habitually used, or to corresponding immunity from taxation by the domiciliary state, that no part of

the use of a car or boat during the tax year be within the domiciliary state, the boats and barges involved in this case would still not be taxable by the State of Ohio.

CONCLUSION.

In the light of the above, we respectfully submit that the State of Ohio had no jurisdiction to tax Appellant's boats and barges for the years involved; that Sections 5328 and 5325 of the Ohio General Code, insofar as they purport to tax such boats and barges for such years, are violative of the due process clause of the Fourteenth Amendment of the Constitution of the United States; and that, accordingly, the judgment of the Supreme Court of Ohio here appealed from should be reversed.

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